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IN THE

Supreme Court of the United States

October Term, 1979

NO. 79-780

CONTINENTAL PLASTICS OF OKLAHOMA, INC.,

Petitioner

v.

PLASTIC CONTAINER CORPORATION,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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December 1979

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The respondent, Plastic Container Corporation, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Tenth Circuit's opinion in this case.

QUESTIONS PRESENTED

(1) Should this Court grant certiorari on an appellate decision in a patent case reversing summary judgment and simply remanding the case to the lower court, which has not yet considered the merits of the issues on remand and could determine those issues in a manner such as to render moot the bases urged by petition in support of certiorari?

(2) Should this Court grant certiorari when the bases urged apply to only one claim of a patent, so that the issue of liability would not be determined by a holding for petitioner?

STATEMENT OF FACTS

The U. S. Court of Appeals for the Tenth Circuit rendered a decision in its No. 77-1753, _____ F.2d _____, 203 U.S.P.Q. 27, in a patent infringement suit. The decision reversed a holding of summary judgment for petitioner for the District Court for the Western District of Oklahoma (Chandler, J.) as to (1) infringement of respondent's U. S. Reissue Patent 28,861 (2) dismissal of respondent's complaint for patent infringement, and (3) award of attorney's fees. The Tenth Circuit remanded the case to the district court for a determination of the issues of (a) the validity of respondent's Reissue patent, and (b) petitioner's intervening rights, if any.

REASONS WHY THE WRIT SHOULD BE DENIED

First, the petition is premature. No final determination of the validity of respondent's Reissue patent has been made by any court. If, e.g., the district court, or on appeal, the Court of Appeals, should hold respondent's patent invalid, there would be no judgment adverse to petitioner from which it could petition, since it is axiomatic that an invalid patent cannot be infringed.

Second, the alleged "admissions", which respondent's counsel vehemently denies, and the effect of a functional statement at the end of a claim, both apply only to claim 5 of the Reissue patent. Any decision by this Court would have no bearing on claim 8, which is in a form quite different from claim 5.

CONCLUSION

For these reasons the petition for certiorari should be denied.

Respectfully submitted,

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